Supreme Court, U.S.
FILED
APR 7 1998
CLERK

No. 97-1646

In The

Supreme Court of the United States

October Term, 1997

NATIONAL ENVIRONMENTAL WASTE CORPORATION,

Petitioner,

vs.

THE CITY OF RIVERSIDE, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STAN T. YAMAMOTO
City Attorney
CAROLYN CONFER
Supervising Assistant City Attorney
CITY ATTORNEY'S OFFICE
3900 Main Street
Riverside, California 92522
(909) 782-5567

J. SCOTT WILLIAMS
Counsel of Record
CATHRINE M. CASTALDI
D. EDWARD HAYS
RUS, MILIBAND, WILLIAMS & SMITH
A Professional Corporation
2600 Michelson Drive
Seventh Floor
Irvine, California 92612
(949) 752-7100

Attorneys for Respondent

146310

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

37 pp

TABLE OF CONTENTS

	Page
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
A. Collection Of Solid Waste In The City Of Riverside	3
B. The City's Administrative Review And Issuance Of Notices Of Termination With Regard To All Solid Waste Evergreen Contracts	4
C. Newco's Bankruptcy Proceeding	5
Reasons for Denying the Writ	9
Argument	11
A. Standard of Review	11
B. Ninth Circuit	11
C. The First Circuit Likewise Rejects A "Mechanical Application" In Determining Whether Retroactive Relief From The Automatic Stay Is Appropriate.	13

Contents

Page

D. The Sixth Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate Based On Limited Equitable Considerations. . . 14

E. Petitioner Concedes That The Seventh Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate On A Case By Case Balancing Of The Equities. 15

F. The Tenth Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate Based On Equitable Considerations. 16

G. The Eleventh Circuit Likewise Refuses To Apply The Bright Line Standard Advocated By Petitioner. 16

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Albany Partners Limited v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670 (11th Cir. 1984) 17

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993) 14, 15

Franklin Savings Ass'n v. Office of Thrift Supervision, 31 F.3d 1020 (10th Cir. 1994) 16

Contents

	Page
In re Calder, 907 F.2d 953 (10th Cir. 1990)	16
In re National Environmental Waste Corporation, 191 B.R. 832 (Bankr. C.D. Cal. 1996)	10
In re Smith Corset Shops, Inc., Appeal of Laurent Brodeur, 696 F.2d 971 (1st Cir. 1982)	14
In re Tucson Estates, 912 F.2d 1162 (9th Cir. 1990) ..	11
Mataya v. Kissinger In re Kissinger, 72 F.3d 107 (9th Cir. 1995)	11
Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984) ...	15
Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969 (1st Cir. 1997)	13, 14

Statutes Cited:

11 U.S.C. § 362 (1993)	2
11 U.S.C. § 362(a) (1993)	16
11 U.S.C. § 362(a)(3) (1993)	10
11 U.S.C. § 362(b)(4) (1993)	3, 9, 10
11 U.S.C. § 362(d)(1) (1993)	12
28 U.S.C. § 1254(1) (1993)	2

Contents

	Page
CAL PUB. RES. CODE § 49300 (West 1996)	2, 3
CAL PUB. RES. CODE § 49504 (West 1996)	2, 3
CAL PUB. RES. CODE § 49520 (West 1996)	2, 5

APPENDIX

Appendix A — 11 U.S.C. § 362 ..... 1a

Appendix B — California Public Resources Code, § 49300 ..... 12a

Appendix C — California Public Resources Code, § 49504 ..... 13a

Appendix D — California Public Resources Code, § 49520 ..... 14a

The City of Riverside (the "City") respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed by National Environmental Waste Corporation, Debtor, to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re National Environmental Waste Corp., a California Corporation, Debtor; National Environmental Waste Corp., a California Corporation, Appellant, v. City of Riverside, a political subdivision of the State of California, Appellee*; and *In re National Environmental Waste Corp., a California Corporation, Debtor; City of Riverside, a political subdivision of the State of California, Appellant v. National Environmental Waste Corp., a California Corporation, Appellee*, 129 F.3d 1052 (9th Cir. 1997) (hereinafter "*Newco*").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 129 F.3d 1052, and is reprinted in the appendix to Petitioner's Petition for Writ of Certiorari [hereinafter "Pet. App."] at A-1. The opinion of the district court is unreported, and is reprinted at Pet. App. E-1. The opinion of the bankruptcy court is reported at 191 B.R. 832 (Bankr. C.D. Cal. 1996), and is reprinted at Pet. App. B-1.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its decision and judgment herein on November 10, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 6, 1998. Petitioner/Cross-Respondent National Environmental Waste Corp., a California corporation ("Petitioner" or "Newco") filed its Petition for Writ of Certiorari, and the petition was placed on the docket on April 7, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are printed in the Appendix attached hereto and are as follows:

11 U.S.C. § 362 (1993)

CAL PUB. RES. CODE § 49300 (West 1996)

CAL PUB. RES. CODE § 49504 (West 1996)

CAL PUB. RES. CODE § 49520 (West 1996)

STATEMENT OF THE CASE

The Petition is dependent on a manufactured split of authority amongst the circuits with respect to the proper standard for determining when an automatic stay under the Bankruptcy Code, 11 U.S.C. § 362 (1993) (the "Automatic Stay"), should be retroactively annulled.

The alleged split is actually the result of the universal application of a factbound analysis for determination of retroactive annulment of the Automatic Stay amongst the circuits. Moreover, Petitioner's statement of the facts, and its application to the law, is fatally flawed, as it relies predominantly on the City's "knowledge" of the bankruptcy proceeding, for which there is no supporting evidence in the record.

As set forth in more detail in the City's Conditional Cross-Petition ("Cross-Petition"), a determination as to whether the City's actions are excepted from the operation of the automatic

stay by virtue of the Regulatory Exception to the automatic stay set forth in 11 U.S.C. § 362(b)(4) (1993) is required before a determination of whether annulment is appropriate in these circumstances. As detailed below, there is no need for this Court's review of this matter.

A. Collection Of Solid Waste In The City Of Riverside

As of 1991, the City's geographic boundaries had been divided into five separate and distinct service areas for purposes of solid waste handling services. Excerpts, pp. 18, 250. To service these separate service areas, the City had retained four separate solid waste enterprises pursuant to CAL. PUB. RES. CODE § 49300 (West 1996).[1] These enterprises included Tri-Co Disposal, Loma Linda (BFI) Disposal, Marks and National Environmental Waste Corporation ("Newco" and/or "Debtor"). *Id.*

The City's contract with Newco ("Agreement") was entered on or about January 18, 1991.[2] *Id.* The City's Agreement with Newco and the other solid waste enterprises were commonly referred to as "evergreen" contracts. Excerpts, pp. 19, 250. The

---

1. Under California law:

> "Solid waste enterprise" means any individual, partnership, joint venture, unincorporated private organization, or private corporation regularly engaged in the business of providing solid waste handling services.

CAL. PUB. RES. CODE § 49504 (West 1996).

2. Although the City has retained Newco's services since 1972, Newco's most recent Agreement with the City had been entered on January 18, 1991. Excerpts, pp. 18, 250.

term evergreen indicates that the agreements run perpetually until the City provides eight years' notice of termination.[3]

B. The City's Administrative Review And Issuance Of Notices Of Termination With Regard To All Solid Waste Evergreen Contracts.

On or about March 11, 1993, the City's Utility Services/ Land Use/Energy Development Committee ("Committee"), at the request of the City Council for the City of Riverside ("City Council"), reviewed the Evergreen contracts between the City and the various solid waste enterprises. Excerpts, pp. 19, 250. The conclusion of the Committee was that the Evergreen contracts did not allow the City to best provide for the health and welfare of its constituents due to the eight-year notice provisions. *Id.*

In so concluding, the Committee found and recommended that "it is simply good public policy to review the contracts periodically to ensure competition, innovation and the best possible service to the City's businesses and residents."[4] The Committee's recommendation also stressed that the termination of the evergreen contracts was "not due to poor performance" with regard to Newco or any other solid waste enterprise.[5]

On or about May 11, 1993, at a regularly conducted public City Council Meeting, the City's Public Works Director

---

3. *See* Agreement, paragraph 22, which provides that the "City may cancel this contract at its sole option without any obligation to show cause upon providing the Contractor with 8 years notice." Excerpts, pp. 51, 250.

4. *See* City Council Memorandum. Excerpts, p. 57.

5. *Id.*

answered questions from the City Council and Mayor with regard to the Committee's recommendation. Excerpts, pp. 19-20. Representatives from Newco, BFI Disposal, Tri-Co Disposal, and others spoke with regard to the Committee's recommendation. *Id.* Following lengthy discussion and debate, the City Council approved the recommendation as presented by a vote of six to one.[6] Excerpts, pp. 20, 56, and 250.

On or about May 18, 1993, the City provided notice ("Notice") of its administrative and regulatory decision to terminate all evergreen contracts with solid waste enterprises, including Newco. This decision also implemented the decision of the legislative branch of the State of California to specifically disfavor the granting of "evergreen" contracts to solid waste enterprises. *See* CAL PUB. RES. CODE § 49520 (West 1996).[7] The Notice specified that "this cancellation is not due to poor performance and does not mean that the contracts cannot be renegotiated prior to May 11, 2001."[8]

C. Newco's Bankruptcy Proceeding

On or about May 4, 1993, Newco filed a voluntary petition under Chapter 11 of Title 11 of the United States Code commencing the within bankruptcy case. Excerpts, p. 250. At the time of commencement of this case, Newco was not in default pursuant to the terms of its Agreement with the City. Excerpts, p. 20. Moreover, the bankruptcy filing was not in any way motivated by the City's pending review of the

---

6. *See* Minutes from May 11, 1993 City Council Meeting. Excerpts, p. 59.

7. Excerpts, pp. 20, 61, and 250-251.

8. *Id.*

evergreen contracts. Excerpts, pp. 20, 250. Despite the contention of Petitioner to the contrary, there is no evidence before this Court that the City had any knowledge of the bankruptcy filing at the time it transmitted the Notice.

The City Council's administrative and regulatory decision to provide eight years' notice of termination with regard to the evergreen contracts was not related in any way to an attempt by the City to collect or improve its priority with regard to a prepetition debt owed to it by Newco. Excerpts, p. 20. The City's Notice explicitly stated that the termination was not due to Newco's performance and that the contracts could be renegotiated prior to the expiration of the eight-year termination period. Excerpts, pp. 20, 61.

Moreover, the City applied its resolution to terminate the evergreen contracts equally to all solid-waste enterprises in furtherance of its public policy objective of protecting the health and welfare of its citizens. Excerpts, pp. 20, 250-251. The Bankruptcy Court specifically found that the City's review and issuance of the notice of termination was based upon the determination that "the Evergreen contracts did not allow the City to provide for the health and welfare of its constituents in the best possible way due to the eight-year notice provision." Excerpts, p. 250.

Newco failed to challenge the City's postpetition actions until April 10, 1995[9] — *nearly two years after the City provided notice to the Newco and ten months after confirmation of the Newco's Chapter 11 Plan.*[10]

---

9. Excerpts, pp. 22, 251.

10. The Court confirmed Newco's First Amended Joint Plan Of Reorganization (the "Plan") on June 22, 1994. Excerpts, p. 260.

Although it did not challenge the City's postpetition notice until two years after the fact, Newco did consider it necessary and appropriate to promptly notify the City by letter dated May 28, 1993, on a separate issue, that it considered the City's actions to be in violation of the automatic stay.[11]

> It is Newco's desire to continue to have an amicable business relationship with the City of Riverside but we felt that it was appropriate to call the potential violation of federal law by your department to your attention.

Id.[12]

In addition, during Newco's two-year period of silence, Newco ratified the notice and acknowledged its validity.

1. On May 11, 1993, Newco failed to raise any claim that the City's actions were stayed during the City Council Meeting in which Newco's representatives participated. Excerpts, p. 259.

2. On March 2, 1994, Newco in its Second Amended Joint Disclosure Statement to Accompany Newco's First Amended Joint Plan of Reorganization ("Second Amended Joint

---

11. Excerpts, pp. 20, 63-64.

12. *See* letter from Newco's attorney dated May 28, 1993, only *10 days after the City provided its eight-year notice*. This letter was written in response to a letter from the City dated May 20, 1993, *two days after* the City provided its eight-year notice. It also is important to note that this letter was written by the same Newco's attorney who now claims that Newco did not challenge the City's actions at the time they were taken because Newco did not feel it appropriate to undertake an alleged duty to notify the City that its notice potentially violated the automatic stay.

Disclosure Statement") ratified the notice and acknowledged its validity:

> On May 11, 1993, the City Council of the City of Riverside approved a recommendation to provide the required eight-year notice to the private refuse haulers (including Newco) to terminate their contracts. In a letter dated May 18, 1993, Newco received written notice from the City's Public Works Director that its contract with the City *will expire* on May 11, 2001 (copy attached hereto as Exhibit "C").

Excerpts, p. 92.[13] (Emphasis added.)

3. On April 27, 1994, Newco's own confirmation expert again ratified the notice and acknowledged its validity:

> Much has been made of *the fact* that Newco's contract with the City *will expire* in May, 2001. What this really means is that Newco will have no competition in the City for approximately eight years of the Plan.

Excerpts, p. 179. (Emphasis added.)

4. By Order entered June 22, 1995, Newco confirmed its First Amended Joint Plan Of Reorganization By Debtors As Modified By Modifications filed April 15, 1994, Second Modification filed May 11, 1994, and Third Modification filed June 8, 1994. The Plan was determined to be fair, equitable, and feasible and thus was confirmed based on the fact that the

---

13. Identical disclosures also were made by Newco in its First Amended Joint Disclosure Statement to Accompany Debtors' Joint Plan of Reorganization filed on February 9, 1994 and in its Joint Disclosure Statement To Accompany Debtors' Joint Plan Of Reorganization filed on November 30, 1993. Excerpts, p. 15.

Agreement had been terminated by the City and would expire in the year 2001 as set forth above.[14]

In response to Newco's challenge, the City filed a Motion For Order Determining Police And Regulatory Power Exception To Automatic Stay Applicable To Actions Taken By The City Of Riverside Re Solid Waste Collection Or, In The Alternative, For Order Annulling Automatic Stay For Cause ("Motion") filed by the City of Riverside ("City" or "Appellee"). The underlying Order of the Court and the procedural history of the case are set forth above.

REASONS FOR DENYING THE WRIT

Should this Court grant the Petition for Writ of Certiorari in this case, it will be called upon to review whether the bankruptcy court abused its discretion in granting the City an annulment of the automatic stay in Newco's bankruptcy case to validate the City's May 18, 1993 Notice of Termination, which gave notice to Newco that its exclusive contract with the City to haul solid waste would terminate in eight years.

Any such decision rests necessarily on the conclusion that the City's action was subject to the automatic stay, rather than expressly excepted from application of the automatic stay as a lawful exercise of the City's police power to regulate the collection and disposal of solid waste pursuant to 11 U.S.C.

---

14. Confirmation of Newco's Plan had been contested by *inter alia* William and Marsha Onink who held a judgment in excess of $5 million against Newco. Excerpts, pp. 93, 176. In support of its contention that Plan provisions providing for payment of this $5 million claim over a ten-year period was fair and equitable to the Oninks, Newco and its expert specifically relied on the fact that Newco's contract with the City would expire in 2001. Excerpts, pp. 92, 179.

§ 362(b)(4) (1993), and that the bankruptcy court's decision that the automatic stay applied was not an error of law. Such questions should be addressed before reaching the issue of what the correct standard should be for annulment of the automatic stay.

The Bankruptcy Court held that the automatic stay imposed under 11 U.S.C. § 362(a)(3) (1993) preempted the City's ability to exercise its police and regulatory power regarding the collection and disposal of solid waste handling, and that the police and regulatory power exception provided pursuant to 11 U.S.C. § 362(b)(4) (1993) did not apply.[15] Both the District Court and the Ninth Circuit Court of Appeals dismissed the City's appeal of the Bankruptcy Court's decision as moot, as they both affirmed the Bankruptcy Court's determination to annul the automatic stay on other grounds.

Assuming *arguendo* that the Automatic Stay applies to restrict the City in its exercise of its police and regulatory powers, neither the Bankruptcy Court, the District Court, nor the Ninth Circuit Court of Appeals abused their discretion in first annulling the Automatic Stay, and then affirming that annulment to ratify the City's actions under the factually specific circumstances applicable to this case.

The contention that the Courts of Appeal are split with respect to the proper test for determining when annulment of the stay is proper misstates existing case law.

---

15. Although the Bankruptcy Court held that the police and regulatory powers exception to the automatic stay did not apply to the City's actions, the court nonetheless annulled the stay based upon Newco's laches and delay in challenging the effectiveness of the City's postpetition termination of Newco's contract. Excerpts, pp. 257-260, 265-266. *See also In re National Environmental Waste Corporation*, 191 B.R. 832 (Bankr. C.D. Cal. 1996). Newco appealed this portion of the Bankruptcy Court's Order, which appeal is presently before this Court.

ARGUMENT

A. Standard of Review

The issue appealed by Petitioner is whether the Bankruptcy Court properly annulled the automatic stay. An order annulling the automatic stay is reviewed under an abuse of discretion standard.[16] *Mataya v. Kissinger In re Kissinger*, 72 F.3d 107 (9th Cir. 1995).

B. Ninth Circuit

In determining that the Bankruptcy Court did not abuse its discretion in granting the City an annulment of the automatic stay, the Ninth Circuit Court of Appeals applied a case-by-case analysis in balancing the equities between the City and Newco. *Newco*, at 1055. In making its determination, the *Newco* Court considered a multiplicity of factors, and noted that those factors constituted a set of "unusual circumstances" supporting the bankruptcy court's decision. *Newco*, at 1055.

The *Newco* Court took the following factors into account in reaching its determination:

> 1. Each party was represented by counsel throughout the relevant time period;
>
> 2. The City failed to object to the City's termination of the Agreement as a violation of the automatic stay;

16. The Memorandum of Decision issued by the Bankruptcy court contained its findings of fact. Excerpt, p. 262. The only disputed issue of fact on this appeal is whether the record supports the finding that the City knowingly violated the automatic stay. A disputed factual finding is reviewed under a clearly erroneous standard. *In re Tucson Estates*, 912 F.2d 1162 (9th Cir. 1990).

3. The City terminated its "evergreen" contracts with all of its waste haulers simultaneously, not just Newco;

4. The "termination" provided an eight-year notice period before becoming effective;

5. The City would be prejudiced by requiring it to contract with Newco for three additional years;

6. Newco reinforced the perception that the termination was valid by failing to challenge it at the May 11, 1993, City Council meeting;

7. Newco adopted the termination as part of its reorganization plan;

8. Possible prejudice to other parties who confirmed the plan in reliance on the eight-year termination notice;

9. Lack of prejudice to Newco if the stay were annulled; and

10. The Court's finding that it would have granted the requested relief if the City had applied beforehand. *Newco*, at 1055.

All of these factors were considered in balancing the equities of this case to determine whether "cause" existed to annul the Automatic Stay under 11 U.S.C. § 362(d)(1) (1993).

C. The First Circuit Likewise Rejects A "Mechanical Application" In Determining Whether Retroactive Relief From The Automatic Stay Is Appropriate.

While the Petitioner cites the First Circuit's opinion in *Soares v. Brockton Credit Union (In re Soares),* 107 F.3d 969 (1st Cir. 1997) for the proposition that the First Circuit applies a "strict standard based upon a creditor's lack of notice or a debtor's bad faith," (App. at p. 9) the *Soares v. Brockton Credit Union* Court specifically rejects the bright line standard advocated by Petitioner and adopts the same case-by-case standard applied by the Ninth Circuit Court of Appeals in *Newco.*

> We do not suggest that we can write a standard that lends itself to mechanical application. Each case is sui generis and must be judged accordingly. But, while it is not practical to anticipate and catalogue the varied circumstances in which retroactive relief from the automatic stay may be warranted, some examples may be helpful.

Soares at 977.

Petitioner attempts to foist the enumerated examples off on this Court as a strict standard applied by the First Circuit; however, the *Soares v. Brockton Credit Union* Court anticipated and rejected such an argument.

> These examples — a creditor's lack of notice or a debtor's bad faith — clearly do not exhaust the possibilities. But they illustrate that a rarely dispensed remedy like retroactive relief from the automatic stay must rest on a set of facts that is both unusual and unusually compelling.

Soares, at 977.

The *Newco* Court recognized the circumstances of the instant case as both unusual and unusually compelling, in applying the same standard as the *Soares v. Brockton Credit Union* Court.

The Petitioner also cites *In re Smith Corset Shops, Inc., Appeal of Laurent Brodeur*, 696 F.2d 971 (1st Cir. 1982) as supporting its erroneous recitation of the standard to be applied in the First Circuit when determining whether annulment of the automatic stay is appropriate. In that case, the First Circuit again applied the "particular facts of this case" in determining that the automatic stay would be annulled. *Id.* at 979.

D. The Sixth Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate Based On Limited Equitable Considerations.

The Petitioner attempts to pigeon-hole the Sixth Circuit's analysis into an exclusive two-pronged analysis of whether the stay should be annulled based upon the court's suggestion that such factors should be considered in granting an annulment of the automatic stay based upon limited equitable considerations. While the court held that "actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable considerations," it stopped short of adopting a rigid standard in defining those limited equitable considerations. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). The court did however

> suggest that only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the Debtor.

Easley, at 911.

Even assuming that this rigid test was mandated by the *Easley v. Pettibone Michigan Corp.* court, which it is not, the Court in the instant case found Newco reinforced the perception that the termination was valid by failing to challenge it at the May 11, 1993, City Council meeting, and adopted the termination as part of its reorganization plan. Thus, the Court's determination in *Newco* would withstand even this rigid standard for balancing the equities.

E. Petitioner Concedes That The Seventh Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate On A Case By Case Balancing Of The Equities.

The Seventh Circuit, like the Ninth Circuit, applies equitable considerations in retroactively annulling the automatic stay. Contrary to the suggestion of Petitioner, the Seventh Circuit, in *Matthews v. Rosene*, 739 F.2d 249 (7th Cir. 1984), did not add a mandatory factor of debtor innocence to the equitable principles applied in determining whether annulment of the automatic stay is appropriate. Rather, it was one of the factors applied by the *Matthews v. Rosene* court in determining that annulment of the stay was appropriate where the Debtor did not raise the stay until some three years after the commencement of state court proceedings, which were ultimately decided against him. The *Matthews v. Rosene* court stated, in pertinent part, as follows:

> although we need not decide if this factor alone would be enough to suspend application of Section 362, our decision to allow equitable considerations to override the serious concerns of the section rests in large measure on the fact that Matthews initiated the state court proceedings.

Id. at 252.

Again, the Courts of Appeal are consistent in their application of equitable principles on a case by case basis in determining whether the stay should be annulled.

F. The Tenth Circuit Determines Whether Retroactive Relief From The Automatic Stay Is Appropriate Based On Equitable Considerations.

The Tenth Circuit, consistent with the Seventh Circuit, found that laches constitutes cause to annul the stay where a debtor remained "stealthily silent" and unreasonably delayed a challenge to a postpetition action. *In re Calder*, 907 F.2d 953 (10th Cir. 1990) [debtor's unreasonable delay in asserting any claimed rights under Section 362(a) formed equitable basis to deny challenge to creditor's postpetition actions]. The *Calder* court did not adopt the rigid standard suggested by Petitioner.

Petitioner also cites *Franklin Savings Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994) for the proposition that the Tenth Circuit "requires the creditor to be honestly ignorant of the pendency of the bankruptcy proceedings." App at p. 13. However, no such *requirement* was adopted by the *Franklin Savings Ass'n v. Office of Thrift Supervision* court, rather the court found it to be a factor considered in determining whether the equitable considerations weighed in favor of annulling the automatic stay. While knowledge was a factor considered by the court, another factor of equal, if not overriding importance to the court, was the creditors' failure to offer "any reason why the stay should be lifted 'for cause.' " *Franklin*, at 1023.

G. The Eleventh Circuit Likewise Refuses To Apply The Bright Line Standard Advocated By Petitioner.

While finding that "Section 362(d) permits bankruptcy courts, in appropriately *limited* circumstances, to grant retroactive

relief from the automatic stay," the Eleventh Circuit did not apply a bright line rule in finding that retroactive annulment of the stay was appropriate where the debtor's petition was filed in bad faith. *Albany Partners Limited v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984).

CONCLUSION

Contrary to Petitioner's contention, a review of the equitable principles applied by the various United States Courts of Appeal, from the First to the Eleventh Circuits, in granting annulment of the automatic stay amplifies that none of the Circuits have adopted the bright line rule advocated by Petitioner. The Circuits are unanimous in providing annulment of the automatic stay after an intensive factual analysis which demonstrates the equities on a case-by-case basis. If analyzed under the standards articulated by any of the Circuits, annulment of the stay in this case would have been affirmed, as it was by the Ninth Circuit in *Newco*. For all of the foregoing reasons, review by this Court is unnecessary.

Respectfully submitted,

J. SCOTT WILLIAMS
Counsel of Record
CATHRINE M. CASTALDI
D. EDWARD HAYS
RUS, MILIBAND, WILLIAMS
& SMITH
A Professional Corporation
2600 Michelson Drive
Seventh Floor
Irvine, California 92612
(949) 752-7100

STAN T. YAMAMOTO
City Attorney
CAROLYN CONFER
Supervising Assistant City Attorney
CITY ATTORNEY'S OFFICE
3900 Main Street
Riverside, California 92522
(909) 782-5567

Attorneys for Respondent

APPENDIX A — 11 U.S.C. § 362

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of criminal action or proceeding against the debtor;

(2) under subsection (a) of this section —

(A) of the commencement or continuation of an action or proceeding for —

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding bar a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment as defined in section 101, 741 or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant,

stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) * under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the

---

* [*Ed. Note:* Paragraphs (12) and (13) were added to 11 U.S.C § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1980. Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L, No. 99-509 provides:

> the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986.

(Cont'd)

commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) ** under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of

---

(Cont'd)

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended, then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.]

** [Ed. Note: Paragraphs (12) and (13) were added to 11 U.S.C. § 362 by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L No. 99-509 (1986). Section 5001 of Pub. L. No. 99-509 provides;

> the amendments made by subsection (a) of this section shall apply only to petitions nled under section 362 of this title 11 United States Code. which are made after August 1, 1886.

(Cont'd)

the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(a) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate programs authorized under such Act;

(Cont'd)

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.)]

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this sector continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed;

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12 or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest,

(2) with respect to a stay of an act against property under subsection (a) of this section, if

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court; may determine for cause by order entered within that 90-day period) —

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments

are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request unless the court, after notice and a hearing orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary heading, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

Appendix A

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages.

APPENDIX B — CALIFORNIA PUBLIC RESOURCES CODE, § 49300

Section

49300. Power to contract.

§ 49300. Power to contract

The legislative body of any incorporated city may contract for the collection of disposal, or both, of garbage, waste, refuse, rubbish, offal, trimmings, or other refuse matter under the terms and conditions that are prescribed by the legislative body of the city by resolution or ordinance.

(Added by Stats. 1989, c. 1095, § 22.)

APPENDIX C — CALIFORNIA PUBLIC RESOURCES CODE, § 49504

§ 49504. Solid waste enterprise

"Solid waste enterprise" means any individual, partnership, joint venture, unincoporated private organization, or private corporation regularly engaged in the business of providing solid waste handling services.

(Added by Stats. 1989, c. 1095, § 22.)

APPENDIX D — CALIFORNIA PUBLIC RESOURCES CODE, § 49520

§ 49520. Continuation of service; exclusive franchise

If a local agency has authorized, by franchise, contract, license, or permit, a solid waste enterprise to provide solid waste handling services and those services have been provided for more than three previous years, the solid waste enterprise may continue to provide those services up to five years after mailed notification to the solid waste enterprise by the local agency having jurisdiction that exclusive solid waste handling services are to be provided or authorized, unless the solid waste enterprise has an exclusive franchise or contract.

If the solid waste enterprise has an exclusive franchise or contract, the solid waste enterprise shall continue to provide those services and shall be limited to the unexpired term of the contract or franchise or five years, whichever is less.

(Added by Stats. 1989, c. 1095, § 22.)